

United States
Circuit Court of Appeals
For the Ninth Circuit

WILLIAM S. WEST,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Brief of Plaintiff in Error

Upon Writ of Error to the United States District Court of
the Eastern District of Washington, Northern Division.

EDWARD A. DAVIS,
Attorney for Plaintiff in Error,
Pasco, Washington.

FILED
JUL 2 1928
P. D. MORTON

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STATEMENT OF THE CASE

This action comes up on Writ of Error sued out from the United State District Court of the Eastern District of Washington, Northern Division, in a case in which the plaintiff in error was convicted upon five counts of selling intoxicating liquor and of maintaining a nuisance. The questions involved are purely questions of evidence.

ASSIGNMENT OF ERROR

I.

The trial court erred in sustaining the objection to evidence as found on page 29 of the Transcript, being a part of the testimony of the witness J. M. Simmons. The evidence, objections and rulings being as follows:

Question: Now, give me the list of the names of the persons that you met at these eight or ten places--how many places were there?

Answer: I said between eight and ten.

Q. Between eight and ten. That must have been nine, then; that is the only number between eight and ten, isn't it? Now, give me the names of the persons that you met at those nine places.

A. If there is any of the cases that are still pending I would rather not answer.

Q. I do not care what you would rather do, I am asking you a question.

A. Why there is--

Mr. Garvin: If the Court please, I cannot see the competency of this testimony in reference to all the places he visited during that period of time.

Mr. Davis: It goes to the credibility of the witness.

The Court: The objection is sustained.

Mr. Davis: Exception.

II.

The trial court erred in overruling the objection of the defendant to evidence as found on page 35 of the Transcript of Record, being a part of the testimony of the witness James D. Scott; the evidence, objections and ruling being as follows:

Q. Whom were you employed out there by?

A. By Mr. West.

Mr. Davis: I object as calling for a conclusion.

The Court: Overruled.

Mr. Garvin. Q.: What were your duties out there, Mr. Scott?

Mr. Davis: Objected to as immaterial.

The Court: Overruled.

Mr. Davis: He might have done his duties or might not.

Mr. Garvin: I asked him what they were.

The Court: I will overrule the objection.

A. I was a waiter.

Witness: My services ceased out there about the end of July.

Q.: About the last of July. What were your general

duties there on those premises?

Mr. Davis: Objected to as immaterial.

The Court: Overruled.

Mr. Davis: Exception.

III.

The trial court erred in overruling the objections of the defendant to evidence and in denying the motion of the defendant to strike certain testimony as found on pages 35 and 36 of the Transcript of Record. The part of the record disclosing said overrulings being as follows:

Witness: I remember Mr. Simmons and Mr. Pickett being out there. I cannot recall the dates but I remember what they did out there. They did the same as anyone else. On one occasion they walked out there through the rain in the afternoon.

Mr. Davis: Just a moment that refers again to the time when the defendant was not there and I object to it.

The Court: Overruled.

Mr. Davis: Now, I want to renew the objection to the evidence of the transactions on the afternoon of the 8th which occurred in the absence of the defendant.

The Court: It will be denied.

Mr. Davis: Exception.

The last order relates back to the testimony of the witness Simmons as found on page 28 of the transcript, which is as follows:

Witness: "I went out again on June 8th in the afternoon with Agent Picketts. We purchased Scotch whiskey and beer. At this time I purchased three drinks of Scotch whiskey and twelve drinks of Canadian beer. They

were served to us by Jerry McKay. The defendant West was not there at that time.”

Mr. Davis: The defendant objects to the testimony of what occurred when he was not there and moves that it be stricken and the jury instructed to disregard it.

The Court: I will reserve my ruling until all the testimony is in, and you may renew your motion.

IV.

The trial court erred in overruling objections to evidence of the witness Maxine Dale as found on page 40 of the Transcript of Record. The testimony, objections and rulings being as follows:

Q.: As a matter of fact, were you not selling drinks up there for fifty cents a drink?

A.: No, sir.

Mr. Davis: Objected to as immaterial and not proper cross-examination.

The Court: Overruled.

Mr. Garvin: Your answer to that is no?

A.: No, sir, I did not.

Q.: You did not sell either Mr. Pickett or Mr. Simmons any whiskey up there?

ARGUMENT

Taking up these assignments of error in the order above mentioned, I have the following to submit.

The first assignment of error goes to a ruling sustaining objection of the prosecutor to questions asked by the defendant's counsel for the purpose of testing the credibility of the witness. This witness was one who had been employed in the capacity of an informer, or

perhaps a little more than an informer. It was his business to visit places suspected of violating the liquor law and secure evidence of such violation and then appear as a witness against the accused party. According to his testimony he had, during his brief stay in Spokane, visited a number of places. He had given testimony as to the persons who were seen by him at the road house conducted by the defendant; and for the purpose of ascertaining how much credit should be attached to his testimony the defendant's counsel asked him the question, "Now, give me the list of names of the persons that you met at these eight or ten places." This question was objected to and the objection sustained.

Transcript of Record, Page 29.

I cannot help thinking that the trial court, in making this ruling failed to comprehend the purpose and effect of the question as propounded. Nothing is better settled as a rule of evidence than this: That where a witness testifies to any facts coming to his knowledge during a course of conduct, or during a series of actions on his part, he may for the purpose of testing his reliability be interrogated as to other facts which occurred or came to his knowledge in the same course of conduct or action.

As a general principle of evidence this proposition will not be questioned. How then can the ruling made by the trial court in this instance be approved. It is especially important that a degree of latitude be allowed in the cross-examination of witnesses of this character. They are employed as informers and for the purpose of

securing convictions of those who violate the liquor law. Their procedure is to go into a locality, secure the list of those who have the reputation of being violators of the liquor law and then go about it to obtain convictions in all of those cases. They start with the theory that these people are guilty and that any means of securing their conviction is justified. Prosecutors and courts take the position very commonly that every assistance must be given to these informers or investigators, that the defendants will of course deny their guilt, and the presumption is indulged that all the defendants accused of liquor violation will necessarily commit perjury, and further, that the testimony of the informers is necessarily true.

The writer of this argument has personal knowledge of two cases in one of which an appeal was taken from the conviction of liquor violation; in the other of which a fine of \$500.00 was paid and a jail sentence of ten months is just being completed. In both cases the convictions were had upon perjured testimony. These were not cases in which the writer was interested, but they are cases in which I know whereof I speak. They were both cases in which the defendants had been law violators. This is not questioned. But the crimes of which they were convicted never were committed. The things which were testified to by government informer never happened.

It is by reason of my personal knowledge of such things and by reason of the growing tendency on the part of prosecutors and trial courts to aid in the convic-

tion of those charged with liquor violation, regardless of the character of the informers, regardless of the absolute helplessness of the accused, that I wish to emphasize this particular part of my argument.

The informer, J. M. Simmons, whose testimony is now under consideration, swore that he and the informer Pickett visited nine or ten places for this same purpose at or about the same time which he was testifying about. He goes into details as to the names of those who were present at the defendant's place, what occurred there, who was drinking and who was buying and who was selling drinks. The cross-examination was for the purpose of ascertaining whether he could testify in the same manner as to the details of his other visits to other places made about the same time. If he could not, why not? In his evidence he intimated that there are other cases still pending. Is it reasonable to suppose that his memory would serve him for the purpose of giving the details of each case when it came up for trial, but that he could not remember such details in the other cases until it came time for their trial. This, of course is not true. Either he remembers these things or he doesn't remember them, and certainly the question propounded was a proper one for the purpose of ascertaining whether he does remember the facts or whether he manufactures facts in each case as he comes to it. The cross-examination should be permitted.

II.

The second assignment of error is based upon the action of the trial court in overruling defendant's objection

to the testimony of the witness James D. Scott when he was asked the question, "What were your general duties there on those premises?" This is a question of evidence and of agency. The witness Scott was an employee of the defendant. He might have been asked to give the terms and conditions of his employment; that is, he might have been asked to set out his contract of employment, whether it were oral or written. He might also have been asked what he did as an employee of the defendant, but he was not asked either of these questions. He was asked the question, "What were your general duties there on those premises?" In other words the agent of the defendant was asked to give his interpretation or opinion as to what were his duties or powers under his agency. This, I believe, the court will agree with me cannot be done under the rule of evidence, which rule is: That an agent cannot testify as to what are his duties or powers. The objection was interposed and was overruled, and I again insist that the trial court was in error.

III.

The third assignment of error is based upon the following state of facts. The informer testified that he went out to the road house conducted by this defendant, that the defendant was not there, but that the witness Scott sold them liquor. At the time the question first arose the trial court reserved his ruling but allowed the question to be answered; undoubtedly for the purpose of ascertaining later on whether or not the witness Scott in selling the liquor was acting under instructions from the defendant. So that this question is more or less interlocked with the question submitted under the second as-

signment of error; that is, if it had been proven in a proper manner that the witness Scott, when he sold liquor, even though the defendant were not present, was acting under instructions from the defendant, then the proof would have been proper. But no such evidence was produced, consequently when at the end of the government's testimony the objection was renewed to the evidence of any transaction which occurred in the absence of the defendant, that objection should have been sustained.

The objection is first found on page 28 of the Transcript of Record and was renewed on page 36 of the Record. This evidence was of transactions had between the informers and the witness Scott, when the defendant was not present and there is no proper proof that the witness was acting under instructions of the defendant, or that the defendant knew what the witness Scott was doing, and yet, this evidence was received for the purpose of convicting the defendant of guilt and doubtless it was the cause of the defendant being so convicted, regardless of the fact that so far as the proof goes he had no knowledge of what Scott was doing, had given Scott no instructions, and was not on the premises at the time.

IV.

The fourth assignment of error is based upon the action of the trial court in overruling an objection to the question propounded to the witness Maxine Dale. "Q.: As a matter of fact were you not selling drinks up there for fifty cents a drink?" Maxine Dale was a witness produced on behalf of the defendant. The question objected to is found on page 40 of the Transcript of Record. This

witness was one of those who went out to the road house of the defendant in the company of the informers. She testified in contradiction of the stories told by the informers. The evidence shows that the informers had first been at her house and had gone from her house, or rather her hotel in Spokane to the roadhouse of the defendant, a distance of several miles. On cross-examination the prosecutor asked her the question whether or not she had herself been selling liquor at the hotel operated by her in Spokane. This question could have but one possible purpose, and that is to discredit the witness by showing that at some other time and place she had herself violated the same law. Under the rule of evidence her credibility as a witness might be questioned by asking her whether or not she had been convicted of a crime, but no such question is put. The prosecutor simply asked her the question whether or not she had committed an offense. No one who has had anything to do with the trial of cases or with receiving or rejecting evidence, will for a single instant contend that such evidence is proper for the purpose of impeachment. That is the only purpose for which it was offered and doubtless for the effect which it had upon the minds of the jurors, and it was highly improper.

For the reasons above set out I believe that the rulings of the trial judge were erroneous and prejudicial as to each of the assignments of error and that the judgment should be reversed.

Respectfully submitted,

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Attorney for Plaintiff in Error.